No. 6072.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Petition of Zusman Fierstein for a Writ of Habeas Corpus.

Zusman Fierstein,
Appellant,

vs.

Joseph A. Conaty, Acting District Director of the Immigration Service of the United States Department of Labor, in and for the Los Angeles, California, District,
Appellee.

APPELLEE'S PETITION FOR REHEARING.

SAMUEL W. MCNABB,
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HARRY B. BLEE,
U. S. Immigration Service
On the Petition.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

FILED
JUN - 7
PAUL P. O'BRIEN

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And now comes Joseph A. Conaty, Acting District Director of the Immigration Service of the United States Department of Labor in and for the Los Angeles, California, District, appellee herein, and respectfully petitions this court for a rehearing of the above cause and that upon a reconsideration of the law and the facts involved in this matter, this court modify its decision and directions to the trial court and make the same more specific by ordering and directing that the issues involved herein be tried *de novo* by the Secretary of Labor and his assist-

ants as provided and suggested in the case of *Tod v. Waldman,* 266 U. S. 113, 120, 69 L. Ed. 195, 45 S. C. 85 (on rehearing: 266 U. S. 574, 45 L. Ed. 193), on the following grounds:

The judgment of the court in the instant case is that the same be "Reversed, with directions to try the issues *de novo* as suggested in Chin Wow v. United States, 208 Fed. 131; Whitfield v. Hanges, 222 Fed. 745; Svarney v. United States, 7 Fed. (2d) 515; Mouratis v. Nagle, 24 Fed. (2d) 799; *In re* Chan Foo Lin, 243 Fed. 137; Ungar v. Seaman, 4 Fed. (2d) 81; Ng Fung Ho, 259 U. S. 276."

We have examined the above citations with considerable care and we believe that they involve in some instances facts and circumstances quite different from those in this case, and in our opinion the decision of this court should be amplified and made more definite and specific so as to show whether it is the judgment of this court that the merits of the case be tried *de novo* by the District Court or by the Department of Labor, Immigration Service. The cases cited by this court as authority for its conclusion do not seem to make it clear as to what proceedings should be taken in the District Court.

The case of *Chin Yow v. United States,* 208 U. S. 13 (erroneously printed in the opinion as 208 Fed. 13), related to a Chinese person, claiming to be a citizen of the United States. The Supreme Court stated that

> "The courts must deal with the matter somehow and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship a longer restraint would be illegal. If he fails, the order of deportation would remain in force."

As we understand it, the effect of the Chin Yow and the *Ng Fung Ho v. White* (259 U. S. 276, 285) cases is that one presenting a substantial claim of being a citizen of the United States is entitled to a judicial determination of that question, for the reason that the jurisdiction of the Immigration Department is limited to aliens and therefore the question of citizenship is a jurisdictional question. In the Ng Fung Ho case, the Supreme Court reversed the judgment of the Circuit Court of Appeals of the Ninth Circuit and remanded the cause to the District Court for trial in that court on the question of citizenship and for further proceedings in conformity with the opinion of the Supreme Court as therein expressed.

The case of *Whitfield v. Hanges,* 222 Fed. 745, decided by the Eighth Circuit, involved certain citizens of Greece who were ordered deported. The District Court ordered in the habeas corpus proceeding that the aliens be discharged without prejudice to the right of the Bureau of Immigration to proceed against them in a lawful manner to prove, if it could do so, the grounds alleged in the warrant of arrest. The Circuit Court held that

> "The practice approved by the Supreme Court and generally prevailing, however, seems to be that the court which takes jurisdiction and custody of the alien under the writ of habeas corpus and finds that his hearing has been unfair retains custody and jurisdiction of him and of the case, and tries on the merits *de novo* on evidence introduced before that court the question whether or not the alien is guilty of the charges made against him in the warrant of arrest before making his discharge absolute."

The case of *Svarney v. U. S.,* 7 Fed. (2d) 515, involved a Greek subject, and, in passing upon the case, the Circuit Court of Appeals of the Eighth Circuit stated, after an analysis of the evidence, that their conclusion was that there was no substantial evidence in the record to support the findings in the warrant for deportation and reversed the judgment of the District Court

> "with directions to try on the merits *de novo* in the District Court, on evidence there to be produced, the question whether or not the alien is guilty of the charges made against him in the warrant of arrest in accordance with the practice outlined in Whitfield v. Hanges, 222 Fed. 745."

Mouratis v. Nagle, 24 Fed. (2d) 799, also involved an alien of the Greek race, and this court reversed the District Court with directions to try the issues *de novo* as suggested in the Chin Yow, Hanges and Svarney cases, *supra.*

The case of *Chan Foo Lin,* 243 Fed. 137, decided by the Sixth Circuit, involved a Chinese person who claimed to be a citizen of the United States, and the cause was remanded to the court below with directions to so modify the order from which the appeal was taken as to retain jurisdiction and custody of the petitioner subject to bail and to hear and determine the case on its merits *de novo,* the court further stating that it was more content to adopt this course since a question of citizenship is involved, citing the Chin Yow case and the case of *U. S. v. Petkos,* 214 Fed. 978, and *Ex parte Chin Loy* (D. C.), 223 Fed. 833.

Ungar v. Seaman, 4 Fed. (2d) 81, decided by the Eighth Circuit, held that the cases there involved must

be remanded to the lower court to hear *de novo* and determine the same on their merits, citing the Whitfield and Chan Foo Lin cases.

In the Chan Foo Lin case, *supra,* the court cited the case of *United States v. Petkos,* 214 Fed. 978, but the court in the Petkos case held that the court had power to make its order of discharge in habeas corpus proceedings

> "conditional, and to be effective only in case those officers (referring to the immigration officers) should fail to give the alien a fair hearing on lawful evidence required by the Immigration Act within a reasonable time. We think this course should have been adopted as and when best calculated to secure proper administration of the legislative provisions applicable."

It seems, therefore, that under the Petkos case, the better way of disposing of the matter is to remand the case to the District Court with directions to that court to modify its order already entered so as to make the decision in the habeas corpus proceedings conditional to the effect that in case the immigration officers shall fail within a reasonable time to give the petitioner a full and fair hearing, then and in that event, the petitioner shall be discharged.

This court in the case of *White v. Wong Quen Luck,* 243 Fed. 547, in dealing with a Chinese person born in China but claiming to be the son of a native of the United States, held that the lower court in ordering the unconditional release of the applicant went further than it should have and that the order of discharge should not have been final but conditional, to be effective only in case the immigration authorities should fail to give applicant the fair

hearing required by law "within a reasonable period, say thirty days hereafter," citing the Petkos case.

Although the last referred to case was decided about seven years before the Tod.case was decided by the Supreme Court, the procedure adopted was practically the same as that ordered in the Tod case, and we feel that the same procedure should be adopted here and that the decision of this court should be so modified or amplified as to follow that procedure.

In the Tod v. Waldman case, the Supreme Court in discussing this subject (266 U. S. 119), through Chief Justice Taft said:

> "Counsel for the Government urge that under three decisions of this court, Chin Yow v. United States, 208 U. S. 8, 13; Kwock Jan Fat v. White, 253 U. S. 454, and Ng Fung Ho v. White, 259 U. S. 276, the question with respect to which the petitioners have not been given a fair hearing should now be remanded to the District Court for its decision. Without saying that the circumstances might not arise which would justify such a variation in the order from that which we now direct, we do not think that the course taken in the cases cited should guide us here. In those cases the single question was whether the petitioner was a citizen of the United States before he sought admission, a question of frequent judicial inquiry. Here the questions are technical ones involving the educational qualifications of an immigrant in a language foreign to ours, and the medical inquiry as to effect of a physical defect on the probability of a child's being able to earn a living or of becoming a public charge. The court is not as well qualified in such cases to consider and decide the issues as the immigration authorities. The statute intends that such questions shall be considered and determined by the immigration authorities. It would seem better to remand the relators to the hearing of

> the appeal, by the Secretary and his assistants, who have constant practice and are better advised in deciding such questions."

None of the cases cited by this court in support of its decision herein make any reference to the opinion of the Supreme Court in the Tod case which was decided on November 17th, 1924, although three of them were decided subsequently thereto: the Svarney case having been decided less than nine months subsequently to the Tod case; the Mouratis case having been decided by this circuit a little more than three years subsequently to the Tod case, and the Ungar case having been decided one month subsequently to the Tod case.

We do not understand why the Tod case was not considered or referred to in the said cases decided after the decision of the Supreme Court in that case, but it might be that the court's attention was not directed thereto or it was thought that the opinion in the Tod case had no application to the facts in the other cases. In this connection, however, we wish to say that while there appears to be no conflict between the decision of the Supreme Court in the Tod case and that of the same court in the Chin Yow and the Ng Fung Ho cases, the Supreme Court states in the Tod case that it does not think that the course taken in the Chin Yow, Kwock Jan Fat and Ng Fung Ho cases should guide the court in the Tod case and construes the decisions in those cases as involving the single question of whether the petitioners therein were citizens of the United States before they sought admission.

The question of citizenship, however, is not involved in the instant case, and we respectfully submit that, ac-

cording to our understanding of the opinion of the Supreme Court in the Tod case, the proper course to pursue is that outlined therein rather than that outlined in the cases cited by this court in its opinion in the case at bar.

In the Tod case, the Supreme Court cites the case of *Mahler v. Eby,* 264 U. S. 32, 46, in which latter case the court held that the warrant of deportation lacked the finding required by the statute and reversed the judgment of the District Court,

> "with directions not to discharge the petitioners until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against them."

The opinions in both the Mahler and Tod cases were written by Chief Justice Taft and we wish to adopt the language of that great jurist in the Tod case wherein it is said:

> "The court is not as well qualified in such cases to consider and decide the issues as the immigration authorities. The statute intends that such questions shall be considered and determined by the immigration authorities. It would seem better to remand the relators to the hearing of the appeal by the Secretary and his assistants who have constant practice and are better advised in deciding such questions."

Adapting and applying the last above quoted words of Chief Justice Taft to the law and facts involved herein, we take the liberty to suggest to this court and request that this case be remanded with directions that the issues involved be tried *de novo* and determined by the Depart-

ment of Labor, Immigration Service, rather than by the District Court.

See also:

Camardo v. Tillinghast, 29 Fed. (2d) 527, 529 (1st Circuit);

U. S. v. Husband, 6 Fed. (2d) 957 (2nd Circuit).

In the last cited case, the court said:

> "The lower court was entitled and required to pass upon the legality of what the Executive Department had done, and that was also the limit of its duty. It was error to hold what was a hearing on new evidence as to certain of the facts."

In *Bieloscycka's Case,* 3 Fed. (2d) 551 (2nd Circuit), in dealing with a situation somewhat similar to the one shown herein, the court said:

> "In other words, the District Court, instead of ascertaining what the Department of Labor had done, and declaring whether or not by so doing the department had exceeded its jurisdiction, held substantially the same kind of a hearing that ought to have been had, and which in point of fact had been held, by the board of special inquiry. This practice is strongly disapproved. It is substantially a usurpation by the courts of those duties of investigation and fact ascertainment which the statute imposes on the Department of Labor. The court below had no right to conduct what was substantially an original investigation; its function was to investigate what the Department of Labor produced as the result of its own investigation."

Our request that the instant case be remanded with directions that a full and fair hearing be had before the Department of Immigration is, we believe, wholly in

accord with the decision of the Second Circuit in the case of *United States v. Day,* 20 Fed. (2d) 302, wherein it was said:

> "The detention was therefore unlawful, and the writ should have been allowed. However, this does not involve the release of the relator. The proper procedure is to remit him to the custody of the Commissioner, who should then give him a hearing before a duly detailed immigration inspector. Tod v. Waldman, 266 U. S. 113, 45 S. Ct. 85, 69 L. Ed. 195."

Respectfully submitted,

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U. S. Immigration Service
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